FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: Commissioners
General Counsel Norton
Staff Director Pehrkon

FROM: Office of the Commission Secretary VZV

DATE: March 29, 2002

SUBJECT: Statement of Reasons for MUR 5156

Attached is a copy of the Statement of Reasons for MUR 5156 signed by Commissioner Daryl R. Wold. This was received in the Commission Secretary's Office on Thursday, March 28, 2002 at 4:10 p.m.

cc: Vincent J. Convery, Jr.
OGC Docket
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Attachments

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

Mark Morton	)	
Bill Liles	)	
Don Bryant	)	MUR 5156
Claude Riley	)	

STATEMENT OF REASONS OF

COMMISSIONER DARRYL R. WOLD

In this matter, the General Counsel recommended that the Commission find reason to believe that the four respondents named in the complaint violated 2 U.S.C. § 441d(a) and send an admonishment letter, but take no further action and close the file. The Commission rejected those recommendations and voted instead to take no action at all against the respondents and close the file.[1] I write this statement of reasons to explain why I joined the majority of my colleagues in rejecting the General Counsel's recommendations.

I.

This matter arose out of an incident in the West Texas town of Muleshoe, a town of just under 5,000 inhabitants, located on U.S. 84 about 68 miles west of Lubbock on the way to the New Mexico border near Clovis. The principal economic activity in the area is farming and ranching. Sometime during the 2000 Presidential campaigns, the normal flow of life in this pastoral setting appears to have been interrupted when several local citizens engaged in spontaneous expressions of electoral advocacy. This activity was soon brought to the attention of the Federal Election Commission by a complaint alleging that the means of expression used by one group of citizens violated Federal law.

[1] The vote was 4-1, with Commissioner Sandstrom dissenting and Commissioner McDonald absent.

According to information in the complaint and in the response to the complaint, it appears that a local businessman, Harvey Bass, the owner of the local furniture and appliance store, got things started when he took an empty refrigerator box, painted on the side "Save our Nation, vote Democrat, Al Gore for President," and posted the sign on the porch of his store where it could be seen by passersby on the highway.

Two of the local citizens who saw this sign, Bill Liles and Mark Morton, "got tired of looking at it," so had a local sign painter paint a "bigger and better" sign measuring 8'x10', that read in part, "Vote for Lower Taxes for All Taxpayers . . .Morality, Family Values, Less Government . . . Local School Control & Better Teacher Pay," "Eat More Beef - Wear Cool Cotton," and -- the fatal words -- "Vote for George W. Bush for President . . . Not Al Gore Socialism." They then borrowed a cotton trailer from a friend, Don Bryant, hung the sign on it and parked it across the street from Mr. Bass' store, "so that he would have to look at it every time he walked out the front door of his business."

According to the response, the sign apparently became a topic of conversation in town, "mostly [at the] Spudnut Shop on Main Street and the Dinner Bell Cafe on Highway 84," and was apparently popular with at least some citizens, because 14 other people, including Claude Riley, chipped in to help pay for it.

The sign, however, was apparently too much for another citizen of Muleshoe, Don Dyer, who evidently knew something about Federal campaign finance law and filed a complaint with the Commission. Mr. Dyer's complaint cited section 110.11(a)(1) of the Commission's regulations and the Commission' s Advisory Opinion 1980-145 and alleged that the sign was in violation of the requirements that it prominently "identify the committee that paid for the communication and state that it was not authorized by any candidate or candidate's committee." Despite Mr. Dyer's concern that the sign did not disclose who paid for it, he named Mssrs. Liles, Morton, Bryant, and Riley as "those known to have contributed" to the sign.

The General Counsel correctly advised the Commission that because the sign contained words of express advocacy ("Vote for George W. Bush" "Not Al Gore"), 2 U.S.C. § 441d(a) and 11 C.F.R. 110.11(a)(1) required it to include a "disclaimer" stating who paid for it and whether or not it was approved by the candidate, as the complaint had contended. Because the sign failed to include the disclaimer (the respondents admitted that it did not), the General Counsel recommended finding reason to believe that the respondents violated § 441d(a), but because there was only one sign, and because the respondents acknowledged their error, the General Counsel recommended sending an admonishment letter and taking no further action.[2]

[2] The General Counsel's analysis did not distinguish between Mssrs. Morton, Liles, and Bryant, who the response indicated were active participants in producing and hanging the sign, and Mr. Riley, who apparently only contributed to its cost after the fact, according to the complaint and the response. A person who makes a contribution for a sign that violates § 441d(a) does not make an "expenditure" so would not literally fall within the provisions of that section. Given the result here, however, that distinction appears moot.

I joined three of my colleagues in rejecting the General Counsel's recommendations, and in voting simply to take no further action and close the file. While I felt that the General Counsel's judgment that this matter did not warrant further investigation or a penalty was correct, I did not agree that we should find reason to believe that the respondents had violated the law.

II.

Underlying my reasons for not finding reason to believe ("RTB" in the Commission's vernacular) in this matter is the basic premise that a finding to that effect is a serious matter. It is a statement by an agency of the Federal government that the agency, literally, has reason to believe that the individuals named as respondents may have violated Federal law. Most respondents would not take such a pronouncement lightly, and we should not make such a pronouncement unless there is a compelling reason to do so. With that in mind, I set out the reasons I did not agree to find RTB in this matter.

A.

First, I think that the Commission should, as a matter of policy, generally refrain from pursuing violations of § 441d(a) where the level of activity involved falls below a threshold level that would justify the Commission using its resources to pursue a violation. Such a policy determination is simply a matter of the Commission's exercise of its prosecutorial discretion in deciding whether to pursue a matter, taking into account the potential seriousness of the violation, the extent of resources required to take any action in response to it, and the effect of pursuing a violation on the exercise of individual's rights of political speech. (See *Heckler v. Chaney*, 470 U.S. 821, 831, 84 L.Ed.2d 714, 105 S.Ct. 1649 (1985), in determining whether to pursue an enforcement action, an agency "must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another . . . [and] whether the particular enforcement action requested best fits the agency's overall policies . . ..").

Several factors that are present here indicate that this case falls below a reasonable threshold for an enforcement action. The sign was put up by individuals, not by a candidate or an ongoing political committee; it involved a small amount of money by any measure;[3] there was no coordination with a candidate;[4] and there was nothing secret about the identity of the perpetrators.[5] In short, this is the kind of spontaneous expression

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[3] The amount spent on the sign is not disclosed in the complaint or response, but the picture of the sign attached to the complaint does not suggest it would have cost more than a few hundred dollars at most.

[4] The respondents' denial of coordination with the Bush campaign is credible not only given the origins of the sign but also its content -- "Eat More Beef, Wear Cool Cotton" was not a theme of the Bush campaign.

[5] They did not, for instance, publish under a pseudonym like the authors of the Federalist Papers did.

of political opinion that individuals should be free to engage in without concern over compliance with government regulations.

Because the statute itself does not contain any minimum threshold level of activity for its application, however -- it literally applies to activity even at the level engaged in by the four citizens of Muleshoe -- it has to be up to the Commission to make a policy decision to refrain from enforcing § 441d(a) in circumstances like this.

There are several reasons why the Commission should make a policy decision and in effect set a minimum threshold for the enforcement of § 441d(a). No substantial purpose of the Act -- whether the focus is on deterring corruption and the appearance of corruption of candidates, or on providing voters with information on the sources of substantial financial support behind candidates -- is implicated in activity at this level. In that light, using the Commission's resources to pursue violations at this level is not a wise use of those resources, even to the stage of finding RTB. Most importantly, the affirmative action by the Commission even in finding RTB infringes on the free exercise of the right of political speech by citizens by subjecting the means of communicating their speech to scrutiny by the government. Citizens should not have to research the law -- or call a lawyer -- before engaging in the kind of spontaneous expression of political opinion that the citizens of Muleshoe did, either in painting a sign on the side of an appliance box or in having a sign painted and hanging it on the side of a cotton trailer.

Because I think that an RTB finding is a serious use of the Commission's power, I don't think it should be used where the purposes of the Act are not implicated, where it would not be a wise use of the Commission's resources and prestige, and where doing so would be damaging to the spontaneous exercise of the rights of individual citizens to express their opinions on candidates for office. The Commission is more than justified in refraining from using its prosecutorial resources to enforce the literal provisions of the law at the level of activity present in this incident in Muleshoe.

B.

Secondly, I have substantial doubts as to the constitutionality of enforcing § 441d(a) in the circumstances of this activity in Muleshoe.

There is no doubt that the speech in question in this matter -- the express advocacy of the election of a candidate for President -- is at the heart of the protections of the First Amendment. The Supreme Court has repeatedly held that speech about candidates for public office is entitled to the highest level of protection of the First Amendment. "[A] major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes." *Mills v. Alabama* 384 U.S. 214, 218-219, 16 L.Ed.2d 484, 86 S.Ct. 1434 (1966). "As the Court observed in *Monitor Patriot Co. v. Roy*, 401 U.S 265, 272, 28 L.Ed.2d 35, 91 S.Ct. 621 (1971), 'it can hardly be

doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office.'" *Buckley v. Valeo*, 424 U.S. 1, 14-15, 46 L.Ed.2d 659, 96 S.Ct. 612 (1976). The circumstance that a group of three or four citizens of Muleshoe were working together to put up their sign does not change the analysis. "The First Amendment protects political association as well as political expression." *Ibid.*

It is also clear that the First Amendment protects the right to speak anonymously -- that is, without having to identify oneself as the speaker -- and protects the right not to have to add unwanted information to speech. "[A]n author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment." *McIntyre v. Ohio*, 514 U.S. 334, 342, 131 L.Ed.2 426, 115 S.Ct. 1511 (1995), citing *Talley v. California* 362 U.S. 60, 4 L.Ed.2d 559, 80 S.Ct. 536 (1960). By requiring written material to state who paid for it and whether or not it was authorized by a candidate, § 441d(a) of the Act deprives a speaker of both aspects of the First Amendment rights noted in *McIntyre*: the right to speak anonymously, and the right not to have to add anything to one's speech.

The question is whether the state has a sufficiently compelling interest in the information required by § 441d(a) to justify depriving a speaker of these rights. *McIntyre v. Ohio, supra*, 514 U.S. at 347. The Supreme Court's decision in *McIntyre* raises at least some question whether that compelling interest is present in circumstances like those of the Muleshoe respondents, and therefore whether the statute can constitutionally be applied to their speech. In *McIntyre*, the Court overturned a fine imposed on Mrs. McIntyre for violating an Ohio statute that required flyers and other material supporting or opposing candidates or ballot measures to include the name and address and other information concerning the person responsible for the material. Mrs. McIntyre had violated the Ohio statute by distributing flyers opposing a referendum of a school tax levy without identifying herself on the flyers as the person who paid for them. She had composed the flyers on her home computer, paid a professional printer to make copies, and then passed them out at public meetings and put some under windshields of cars. She was assisted by a friend and her son, but otherwise acted independently of any other opponent of the measure. The Court found that Ohio did not have a sufficiently compelling reason to impose its disclaimer requirement on this activity of Mrs. McIntyre, in derogation of her First Amendment right to speak anonymously.

The Court described the Ohio statute as overbroad in several respects in its application to Mrs. McIntyre, including that it "applies not only to the activities of candidates and their organized supporters, but also to individuals acting independently and using only their own modest resources." 514 U.S. at 351. The Court noted that it had originally "stressed the importance of this distinction" in *Buckley v. Valeo*, 424 U.S. 1, 37, 46 L.Ed.2d 659, 96 S.Ct. 612 (1976) when it noted that spending by volunteers in coordination with a candidate could be treated as contributions (and therefore limited)

"without limiting actions voluntarily undertaken by citizens independently of a candidate's campaign." 514 U.S. at 351, n. 14.

This distinction clearly applies to the activities of the Muleshoe respondents, who, like Mrs. McIntyre, acted independently of any candidate and used only their own modest resources. The fact that they were apparently also modestly reimbursed to an extent after the fact by other citizens who approved of their effort should not change the analysis. There is thus at least substantial doubt about the constitutionality of § 441d as applied to the activity of the Muleshoe respondents. Because of the First Amendment interests implicated in this matter, that doubt certainly would justify the Commission in exercising its prosecutorial discretion not to enforce § 441d against their speech. I believe that we should in fact refrain because of that doubt, and because of the importance of not unnecessarily infringing on the exercise of the right of citizens to engage in political advocacy.

C.

Thirdly, I have serious reservations about the statutory basis for using an RTB finding to express our opinion that there may have been a violation of the law, where we do not intend to pursue enforcement through the rest of the steps provided in 2 U.S.C. § 437g. I previously explained my reservations in this regard in more detail in my statement of reasons in MUR 5017 (In the Matter of Southwest Publishers). Briefly, it appears to me that the most appropriate reading of § 437g(a)(2) of the Act, which provides for the "reason to believe" finding as a predicate to opening an investigation, is that this finding is to be used only where the Commission intends, in fact, to proceed with that next step. I have substantial doubt that the Commission has the statutory authority to use an RTB finding for some other purpose, such as simply expressing its opinion that there may have been a violation of the law.

I recognize that in making the recommendation to find RTB without pursuing an investigation, the General Counsel was following a long-established practice of the Commission. I think, however, that it is time to reexamine that practice. My reservations about this practice were another reason that I did not support the General Counsel's recommendation to find RTB in this matter.

III.

This matter highlights the unexpected way that the Federal Election Campaign Act can impact citizens who justifiably think they have the right to publicize their views on who should be elected President of this country, and to do so without concern about government regulation. Given the long tradition of free speech in this country, protected by the First Amendment to our Constitution, that belief is understandable.

The Commission should not disabuse citizens of that belief and tread on their speech where the Commission is not compelled to do so by the purposes underlying the

Act. Because there is no compelling reason to take action in cases like the one presented here, it was entirely appropriate that the Commission refrain from doing so, and allow speech to flourish as it did in the Muleshoe incident.

Dated: March 22, 2002

Darryl R. Wold

Darryl R. Wold, Commissioner